BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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In the Matter of the Application of California-American Water Company (U 210 W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates.	A.12-04-019 (Filed April 23, 2012)

MARINA COAST WATER DISTRICT'S REPLY BRIEF ON THE SETTLING PARTIES' MOTIONS TO APPROVE SETTLEMENT AGREEMENT AND SETTLEMENT AGREEMENT ON PLANT SIZE AND OPERATION

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I. INTRODUCTION

MCWD respectfully submits its Reply Brief on the Settling Parties' Motions to Approve Settlement Agreement and Settlement Agreement on Plant Size and Operation. Terms and abbreviations used herein are the same as those defined in MCWD's Opening Brief on the Settling Parties' Motions to Approve Settlement Agreement and Settlement Agreement on Plant Size and Operation.

II. ARGUMENT

Not one of the parties' Opening Briefs presents a means of curing the chief legal flaws identified by MCWD in its Opening Brief, *i.e.*, impairment of MCWD's rights in relation to the 1996 Annexation Agreement, potential injury to MCWD and other users of SVGB groundwater, failure to comply with the Agency Act and with CEQA, and failure to consider the entire project's potential environmental impacts and reasonable alternative projects on a sufficient record, including an evidentiary hearing that addresses environmental impacts.

The record currently before the Commission does not support approval of either of the two proposed settlements as "reasonable in light of the whole record, consistent with law, and in the public interest." (Rule 12.1(d).) MCWD maintains that the record remains insufficient, and that the Opening Briefs of several parties support this conclusion. (*See, e.g.,* Opening Brief of Salinas Valley Water Coalition and Monterey County Farm Bureau, p. 3; Surfrider Opening Brief, pp. 3-8, 10, *joined by* Landwatch; WaterPlus Opening Brief, p. 10; Public Trust Alliance Opening Brief, pp. 3-5.)

Therefore, MCWD respectfully renews its request that, absent revisions to the MPWSP and the Settlements that resolve the legal problems posed by the project's non-compliance with law and its impairment of MCWD's interests, and absent the Commission's lawful resolution of the environmental review issues set forth in MCWD's Opening brief, the Commission deny both

the motion for approval of the MPWSP Settlement and the motion for approval of the Sizing Settlement.

A. Desalination Plant Sizing

1. Governance/Jurisdictional Issues and Phasing

MCWD appreciates the clarification in joint briefing from certain parties (Cal-Am, the Regional Water Authority, the Monterey Peninsula Water Management District, Pacific Grove and the County of Monterey (collectively, the "Joint Governance Parties")) concerning the scope of the Governance Committee's responsibilities and powers, pursuant to the amended Governance Committee Agreement. (Opening Brief of Joint Governance Parties, p. 4.) It appears that, pursuant to the amended Governance Committee Agreement, the Governance Committee may issue an opinion on GWR – not a final decision – which may be considered by the Commission as the Commission makes its decisions on GWR and desalination plant sizing. (*Ibid.*) This amendment appears to bring section 16 of the MPWSP Settlement and the Governance Agreement into closer harmony with sections 4.2 and 4.3 of the MPWSP Settlement.

Nonetheless, MCWD maintains its position that any approval of the MPWSP prior to consideration of the GWR element raises legal issues concerning both CEQA compliance, and the Commission's obligation to consider all relevant factors in its CPCN decision pursuant to sections 1001 and 1002 of the Public Utilities Code and established Supreme Court authority. (*See* MCWD's Opening Brief, pp. 15-16, 17-23.)

2. Demand

Unfortunately, instead of providing clarification, the joint briefing on plant sizing from a different group of parties (Cal-Am, the Regional Water Authority, the Monterey Peninsula Water Management District, Pacific Grove, the Monterey Regional Water Pollution Control Agency,

and the Coalition of Peninsula Businesses (collectively, the "Joint Sizing Parties")) generates even greater confusion concerning the requirements for demand calculation. (Opening Brief of Joint Sizing Parties, pp. 2-5.) The Joint Sizing Parties assert, on the basis of the Commission's General Order ("GO") 103-A, that under California law, Cal-Am must demonstrate that its system can satisfy projected demand based upon a ten-year historical average, which the brief states is 15,162 AFY. However, what section II.2.B.(3) ("Potable Water System Capacity") of GO 103-A actually requires is "capacity to meet the source capacity requirements as defined in the Waterworks Standards, CCR Title 22, Section 64554." (GO 103-A, p. 11.) Section 64554 requires sufficient capacity to meet a maximum daily demand ("MDD") and four hours of peak hourly demand ("PHD") "in the system as a whole and in each individual pressure zone." (Cal. Code Regs., tit. 22, § 64554, subd. (a)(3).) The calculation of MDD and PHD is to be based upon daily water usage data, if available, or upon calculations derived from monthly water usage data, over a ten year period as set forth in section 64554. (*Id.* at § 64554, subds. (b)(1) and (2).) Cal-Am's compliance filings do not appear to provide the Commission with sufficient historical usage information to calculate these amounts, whether over a five-year period or a ten-year period. (*See, e.g.,* Cal-Am Compliance filings of Nov. 19 and 22, 2013 and attachments thereto.)

Thus it is impossible for the Commission, the parties or the public to know whether or not the system demand figures utilized by Cal-Am will meet the requirements of Section 64554 and GO 103-A. If Cal-Am's demand figures do not comply with the applicable Waterworks Standards, the Commission must determine on a sufficient record whether or not it is reasonable and in the public interest for the proposed MPWSP to depart from those standards. For these reasons, the record before the Commission is insufficient to determine the compliance with law, as well as the reasonableness and public interest, of the desalination plant sizing proposals set forth in the proposed Settlement Agreements.

B. MCWD's Other Legal Issues

For all of the reasons set forth in MCWD's Opening Brief (pp. 2-9), including impairment of MCWD's rights in relation to the 1996 Annexation Agreement and potential injury to MCWD and other users of SVGB groundwater, the Commission should not approve the proposed CEMEX well location and should require Cal-Am to look only to its contingency well locations. (MPWSP Settlement, § 10.2.)

As set forth in MCWD's Opening Brief, (pp. 10-13), unless Cal-Am can provide evidence of a concrete, feasible mechanism for the proposed MPWSP to achieve compliance with the non-export of groundwater provisions of the Agency Act, the Commission cannot find the Settlements reasonable or in compliance with law. Likewise, unless and until Cal-Am is able to demonstrate on a sufficient record that it possesses water rights sufficient to support its proposed withdrawals of groundwater from the SVGB and that its MPWSP pumping will not have a substantial adverse impact on other users of the SVGB and that its source water meets the criteria of General Order 103-A, it may not legally extract brackish source water for the MPWSP from the SVGB, and therefore the MPWSP as proposed would not be consistent with law. (*See* MCWD Opening Brief, pp. 13-14.)

Should an expanded record in the future course of this Application result in the Commission's certification of a clearly-defined and clearly-described MPWSP project, so that a determination can be made whether such a certificated project does or does not conflict with the Monterey County Desal Ordinance, the Commission must then revisit its hypothetical and concededly-advisory opinion concerning preemption of the Desal Ordinance, as MCWD has previously pointed out. (*See* MCWD Opening Brief, pp. 16-17.)

Finally, the Commission's environmental review must be completed and sufficient, and the Commission must have the opportunity to consider the entire project's potential

environmental impacts and those of reasonable project alternatives on a sufficient record, including an evidentiary hearing that addresses environmental impacts, as MCWD requested in its Opening Brief (pp. 17-23) and in previous filings in this proceeding.

III. CONCLUSION

Because the MPWSP Settlement and the Sizing Settlement, as proposed, are not reasonable in light of the whole record, are not consistent with law, and are not in the public interest (Rule 12.1(d)), neither settlement can be approved. The project must be configured to avoid impairment of the 1996 Annexation Agreement and injury to MCWD and other users of SVGB groundwater, and to comply with the Agency Act and other applicable laws. The *entire* project's potential environmental impacts and those of all reasonable project alternatives must be thoroughly examined through the Commission's completion, evaluation and certification of its Subsequent EIR, *and* its exploration of the environmental impacts of the project at an evidentiary hearing.

Absent revisions to the MPWSP and the Settlements that resolve the legal problems posed by the project's non-compliance with law and its impairment of MCWD's interests, and absent the Commission's lawful resolution of the environmental review issues set forth above, MCWD respectfully requests that the Commission deny both the motion for approval of the MPWSP Settlement and the motion for approval of the Sizing Settlement.

DATED: February 14, 2014

Respectfully submitted,
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